In the Supreme Court of the United States

THE KANSAS CITY NORTHWESTERN RAILROAD COMPANY,
Appellant.

vs.

FREDERICK ZIMMERMAN, AS ADMINISTRATOR, ETC., ET AL,
Defendant.

APPELLANT'S BRIEF ON APPELLEE'S MOTION TO DISMISS.

STATEMENT OF FACTS.

On the 2nd day of February, 1889, L. Zimmerman, now deceased, began his action in the District Court of Leavenworth county, Kansas, against the Kansas City, *Wyandotte* & Northwestern Railroad Company to recover damages to real property in Leavenworth abutting on a

street, on account of construction of a railroad in said street, and on the 15th day of May, 1897, recovered a judgment for $3,000.00. (Rec., p. 54.)

In January, 1888, the Kansas City, *Wyandotte* & Northwestern Railroad Company mortgaged all of its road and franchises to the Farmers' Loan & Trust Company of New York (Rec., p. 54), and about March 21st, 1890, the said Trust Company instituted its action against said Railway Company, in the Circuit Court of the United States for the district of Kansas, to foreclose the mortgage (Rec., p. 54), and a Receiver was appointed by said court. On the 18th day of January, 1893, a decree of foreclosure was entered by the Circuit Court, and in 1894 all of the property of the Kansas City, Wyandotte & Northwestern Railroad Company was sold to purchasing trustees, who thereupon conveyed the same to the appellant, "The Kansas City Northwestern Railroad Company, a Kansas corporation." (Rec., p. 55.) The decree of foreclosure provided that (Rec., p. 55):

> "This court hereby reserves to itself from this decree the power and jurisdiction, both as against the parties to this suit and as against said purchaser at said contemplated sale, to hear and adjudicate all pending and undetermined claims hereafter presented, whether contracted by the receiver or the mortgagor company before the commencement of this suit, and to determine as to said claims whether they are or are not valid, and entitled to priority over the mort

gage debts hereinbefore referred to, and to make all such orders and supplementary decrees touching said claims and demands as may be deemed proper."

And the order of confirmation provided that (Rec., p. 56):

> "And said master commissioner is ordered and directed to make to the purchasers at said sale, to-wit: George C. Smith and B. P. Waggener, purchasing trustees, a good and sufficient deed, conveying the property mentioned and described in said report to said purchasers—said report being confirmed, however, subject to the provisions of said original decree, and subject to the provisions to be contained in the deed executed by said master commissioner to said purchaser."

And, by order of the court (Rec., p. 56) the following was endorsed on the deed:

> "The foregoing deed examined and approved subject to the condition that the purchaser take the property subject to all the orders of the court relating to the payment of the debts of the company, and the receiver, and said property shall remain liable for such debts, if any there are remaining unpaid.
>
> HENRY C. CALDWELL, *U. S. Circuit Judge.*"

On the 21st day of May, 1899, L. Zimmerman commenced his action in the District Court of Leavenworth county, Kansas, against the appellant, the Kansas City Northwestern Railroad Company, to compel that company to pay the judgment for $3,000.00 which he had recovered

in May, 1898, against the Kansas City, *Wyandotte* & Northwestern Railroad Company (Rec., p. 54)—the defendant in the foreclosure suit—and to enjoin the operation of the road until it was paid. Neither L. Zimmerman nor the Kansas City Northwestern Railroad Company was a party to the foreclosure suit. Each was a citizen of the state of Kansas.

In the petition filed in the State District Court, the plaintiff based and founded his action upon the decree of the Circuit Court in the foreclosure suit (Rec., p. 5). On application of the defendant, the suit was removed to the Circuit Court—not upon the ground of diverse citizenship, but upon the erroneous assumption that, because the action was founded upon the decree of the federal court, it involved a federal question. When the record was filed in the Circuit Court on removal, the plaintiff re-cast his petition to conform to the equity rules. (Rec., pp. 16-23.) The defendant filed a demurrer (Rec., pp. 44-46), which was sustained, upon the sole ground that the court had no jurisdiction. (Rec., pp. 47-48.)

> "The foundation of complainant's demand against the defendant railroad company is the judgment of three thousand dollars obtained by complainant's intestate against the Kansas City, Wyandotte & Northwestern Railroad Company in the State Court. If complainant may compel satisfaction of that judgment, or any part of it, against the defendant railroad

company, as assignee of the purchasing committee which purchased the property of the Kansas City, Wyandotte & Northwestern Railroad Company at a foreclosure sale of that property, it is, by reason of the terms of the decree entered in the Federal Court under which the purchase was made, and by reason of the terms of the deed, based upon that decree by which the purchasing committee took title to the property. That decree referred to in complainant's amended bill of complaint expressly provides as follows:

'This court hereby reserves to itself from this decree the power and jurisdiction, both as against the parties to this suit, and as against said purchaser at said contemplated sale, to hear and adjudicate all pending and undetermined claims hereafter presented, whether contracted by the receiver or the mortgagor company before the commencement of this suit, and to determine as to said claims whether they are or are not valid, and entitled to priority over the mortgage debts hereinbefore referred to, and to make all such orders and supplementary decrees touching said claims and demands as may be deemed proper, etc.'

Hence, in my judgment, the District Court of Leavenworth county, Kansas, had no jurisdiction to either enforce the judgment in suit against the assignee of the purchaser under such decree, or to determine the validity and extent of the judgment now in suit, or to establish such judgment as a lien on the property purchased under the decree superior to the mortgage liens therein foreclosed, and that this court, by removal of this cause from the State Court

required only such jurisdiction and power to determine as the State Court possessed, and might have exercised had no removal been obtained. That the proper method of obtaining satisfaction of the judgment in suit from the defendant company, or out of property of the Kansas City, Wyandotte & Northwestern Railroad, by it purchased under the decree, if any such may be obtained by complainant, is by intervention in the original foreclosure suit in which the decree relied upon by complainant was entered.

It follows, the motion to remand to the State Court must be denied, and the amended demurrer to the amended bill of complaint must be sustained, with leave to apply to this court for leave to file an intervening petition in the original suit of the Farmers' Loan & Trust Company of New York, against the Kansas City, Wyandotte & Northwestern Railroad Company, et al., number 6472, equity on the dockets of this court.

JOHN C. POLLOCK, *Judge.*"

From this order of the Circuit Court Zimmerman perfected appeal to the United States Circuit Court of Appeals. (Rec., pp. 61-62.) The order of the Circuit Court sustaining the demurrer to the bill of complaint, on the appeal of the complainant, was reversed by the Circuit Court of Appeals, and the cause remanded, "with instructions to proceed in harmony with this opinion."

Thereafter the Circuit Court, on due proceedings had, entered a final decree (Rec., pp. 53-56) in favor of the complainant, and allowed an appeal on application of ap-

pellant to this court. (Rec., pp. 58-9.) (See also supplemental transcript of record.) The Circuit Court of Appeals declined to view the case as one of jurisdiction, and proceeded to a consideration of the equities of complainant's bill, which the Circuit Court had not yet passed upon, holding them sufficient to entitle him to the relief asked, and remanded the case, as before stated, "with instructions to proceed in harmony with this opinion." Thereupon the defendant re-filed its demurrer, which was overruled (Rec., p. 52), and a decree *pro confesso* was entered.

ARGUMENT.

FIRST.

THE DISTRICT COURT OF LEAVENWORTH COUNTY HAD NO JURISDICTION OF THE SUBJECT MATTER OF THE ACTION INSTITUTED IN THAT COURT BY ZIMMERMAN AGAINST THE KANSAS CITY, NORTHWESTERN RAILROAD COMPANY, BASED, AS IT WAS, UPON THE DECREE OF FORECLOSURE IN THE FEDERAL COURT.

It conclusively appears from the record that the Federal Court, in the foreclosure suit, expressly retained juris-

diction "to hear and adjudicate all pending and undetermined claims, * * * whether contracted by the receiver or the mortgagor company before the commencement of this suit, and to determine, as to said claims, whether they are or are not valid and entitled to priority over the mortgage debts, * * * and to make all such orders and supplementary decrees touching said claims and demands as may be deemed proper." That order is now in force.

It would seem that our contention that the State Court had no jurisdiction is settled by this court in the case of *Wabash R. R. Co.* v. *Adelbert College, etc.*, in the opinion handed down on January 6th, 1908, and not yet published in reports. The case is identical in point with the facts of the case at bar. In that case Mr. Justice Moody, speaking for the court, said that:

> "The effect of the decree is to say to any purchaser under it: 'You must take this property subject to all claims which this court shall hereafter adjudge to be lawful, and you may be assured that you will be held to pay none other, and for the purpose of making this statement good, the court reserves jurisdiction over the property and claims in respect to it, and the right to take it again into possession, and exercise again the power of sale.' It is obvious therefore, that the court has parted with the possession of the property only conditionally, and that it has preserved complete control over it, and full jurisdiction over the claims which might be made against it. We may now consider the question whether the

state court had the jurisdiction to render the judgment in the case at bar, as and when it was rendered.

When a court of competent jurisdiction has, by appropriate proceedings, taken property into its possession through its officers, the property is thereby withdrawn from the jurisdiction of all other courts. The latter courts, though of concurrent jurisdiction, are without power to render any judgment which invades or disturbs the possession of the property while it is in the custody of the court which has seized it. For the purpose of avoiding injustice which otherwise might result, a court during the continuance of its possession has, as incident thereto, and as ancillary to the suit in which the possession was acquired, jurisdiction to hear and determine all questions respecting the title, the possession or the control of the property. In the courts of the United States this incidental and ancillary jurisdiction exists, although in the subordinate suit there is no jurisdiction arising out of diversity of citizenship, or the nature of the controversy. Those principles are of general application, and not peculiar to the relations of the courts of the United States to the courts of the states; they are, however, of especial importance with respect to the relations of those courts, which might exercise independent jurisdiction in the same territory, often over the same property, persons and controversies. They are not based upon any supposed superiority of one court over the others, but serve to prevent a conflict over the possession of property which would be unseemly and subversive of justice, and have been applied by this court in many cases, some of which are cited, sometimes in favor of the jurisdiction of the

courts of the states, and sometimes in favor of the jurisdiction of the courts of the United States, but always, it is believed, impartially and with a spirit of respect for the just authority of the states of the Union.

Hagan v. *Lucas*, 10 Pet., 400;
Williams v. *Benedict*, 8 How., 107;
Wiswall v. *Sampson*, 14 How., 52.;
Peale v. *Phipps*, 14 How., 368;
Pulliam v. *Osborne*, 17 How., 471;
Taylor v. *Carryl*, 20 How., 583;
Freeman v. *Howe*, 24 How., 450;
Buck v. *Colbath*, 3 Wall., 334;
Yonley v. *Lavender*, 21 Wall., 276;
People's Bank v. *Calhoun*, 102 U. S., 256;
Barton v. *Barbour*, 104 U. S., 126;
Krippendorf v. *Hyde*, 110 U. S., 276;
Pac. R. of Mo. v. *Mo. Pac. Ry.*, 111 U. S., 505;
Covell v. *Heyman*, 111 U. S., 176;
Heidritter v. *Elizabeth Oil Cloth Co.*, 112 U. S., 294;
Gumbell v. *Pitkin*, 124 U. S., 131;
Johnson v. *Christian*, 125 U. S., 642;
Morgan's Co. v. *Texas Cen. Ry.*, 137 U. S., 171;
Porter v. *Sabin*, 149 U. S., 473.

The state courts in the case at bar, in deference, it is said by counsel, to these well-established principles, deferred action until after the property had been conveyed to the purchasers under the decree of foreclosure, and the receiver discharged. Upon the termination of the receivership, it is urged, the exclusive jurisdiction of the Circuit Court ended, and the right of the state court to resume its normal jurisdiction revived. As this suit was begun before the property was taken into

the possession of the Circuit Court, and when, therefore, the state court had jurisdiction over it, and remained dormant, except for the addition of parties and the filing of pleadings and service of process, until after the receivers had been discharged and the property conveyed to the purchaser, this would be true, if, as in *Shields* v. *Coleman*, 157 U. S., 168, the possession of the Circuit Court and its relation to the *res* had come to an end. But the Circuit Court attempted, in the decree of March 23rd, to prolong its control of the property, beyond the conveyance to the purchasers, and the discharge of the receivers, up to the point of time when the claims therein stated should be ascertained, and the just remedy for them applied, and to reserve the right to retake the property for those purposes. The effect of reservations in a decree of foreclosure, which, to say the least, were no broader than those in this decree, was before the court in *Julian* v. *Central Trust Co.*, 193 U. S., 93. The reservations in that case are stated on page 110, and of them the court said (p. 111):

'It is obvious that, by this decree of sale and confirmation, it was the intention and purpose of the federal court to retain jurisdiction over the cause, so far as was necessary to determine all liens and demands to be paid by the purchaser.'

And again, (p. 112):

'The federal court, by its decree, reserved the right to determine what liens or claims should be charged upon the title conveyed by the court.'

And again, (p. 113):

'The Circuit Court, by the order made, retained jurisdiction of the case to settle all claims against the

property, and to determine what burdens should be borne by the purchaser, as a condition of holding the title conveyed.'

Here was a clear determination by this court that the exclusive jurisdiction of claims against a *res*, which had arisen out of the possession of the *res* in judicial proceedings for foreclosure of mortgages, might be continued after sale and conveyance of the property, for the purpose of deciding what claims were legally chargeable against it. This is precisely what the Circuit Court attempted to do with respect to the property now before us, and its right to do it is clearly supported by the decision in the Julian case. Under the reservations in that case, the Circuit Court was held to have power to protect the property sold by its order from sale on an execution issued by a state court. The state court was thought to be without power to direct such a sale, even though its judgment was based upon a claim arising after the conveyance of the property, because, under the peculiar facts of the case, the judgment and execution in effect annulled the federal decree. The principle underlying that case, however, which is material here, is that the jurisdiction over the *res* could be continued by reservations, after the physical possession of the property had been abandoned. This court (p. 112) said there:

'The federal court, in protecting the purchaser under such circumstances, was acting in pursuance of the jurisdiction acquired when the foreclosure proceedings were begun.'

It needs but a moment's consideration of the facts in the case at bar to convince that if the exclusive jurisdiction of the federal court were denied, every evil

which that doctrine was designed to avert would be let in. Some time, it is to be supposed, there will be a sale by order of the federal court to satisfy Compton's lien. If the sale by the state court of the same property to satisfy other lien-holders of equal rank with Compton is allowed to proceed, which sale will convey the better title? Who would be bold enough to determine for himself that question? How much longer would the litigation with respect to this property continue if two persons could be found to purchase at the two sales? It is no answer to these questions that Compton has been made a party to this suit in the state court. He is still a party to the proceedings in the federal court, and he must find satisfaction for his claim there. We are of the opinion that, by the effect of the reservation in the decree of March 23d, 1889, the exclusive jurisdiction of the federal court over the property therein dealt with has continued, notwithstanding the conditional conveyance, and that it still exists. The defendants in error must pursue their remedy in that court, which doubtless will consider the decisions of the state courts on questions of state law with the respect which the decisions of this court require. It follows, therefore, that the state court was without power to decree a sale of the property, and its judgment must be reversed."

The Circuit Court, in the foreclosure suit, acquired jurisdiction on the 31st day of March, 1890, (Rec., p. 54), and the suit against the Kansas City Northwestern Railroad Company was commenced on the 21st day of May, 1899, (Rec., p. 54), about nine years after the federal court acquired jurisdiction.

Many times has this court decided that "such jurisdiction cannot be divested or arrested by subsequent proceedings in another court."

Hockrader v. *Wadley*, 172 U. S., 148;
In re Chatwood, 165 U. S., 443;
Farmers, etc., Trust Co. v. *R. R. Co.*, 154 U. S., 51.

The Zimmermans, at no time, attempted to intervene in the foreclosure suit. The state court, therefore, had no jurisdiction of the subject-matter.

SECOND.

ON REMOVAL FROM THE STATE COURT TO THE CIRCUIT COURT, IF PROPERLY REMOVED, THE CIRCUIT COURT ACQUIRED NO WIDER JURISDICTION THAN THE STATE COURT HAD FROM WHICH IT WAS REMOVED.

This proposition has often been announced by this court in many decisions, and it would seem only necessary to refer to a few of such decisions.

In the case of *E. Tenn. V. & G. R.* v. *South Tel.*, 112 U. S., 310, the principle was announced that the courts of the United States, on removal of a suit from a state court, are "clothed with no greater power in the premises than the courts of the state would have possessed if their jurisdiction had been preserved."

Randall v. *Howard*, 2 Block (U. S.), 589.

In the case of *Swift* v. *R. R. Co.*, 58 Fed., 861, it was said that:

> "The courts of the United States upon removed cases have no wider jurisdiction than the courts of the states from which they were removed. The removal simply transfers the hearing from the state court to the national tribunal, but does not enlarge the right of the court to hear the cause."

To the same effect:

Barrow v. *Hunton*, 99 U. S., 80-85;

Minnesota, etc., v. *St. Paul*, 2 Wall., 633.

THIRD.

THE SUIT WAS IMPROPERLY REMOVED FROM THE STATE COURT. THE CONSTRUCTION OF THE DECREE OF THE FEDERAL COURT DID NOT INVOLVE A FEDERAL QUESTION, AND THEREFORE THE CIRCUIT COURT WAS WITHOUT JURISDICTION.

"The fact that a judgment was recovered in a court of the United States does not, in a suit upon the judgment, raise a question under the laws of the United States, within the meaning of the act of March 3d, 1875."

Provident Savings Society v. *Ford*, 114 U. S., 635;

Leather Mfg. Bank v. *Cooper*, 120 U. S., 778;

Sweringer v. *St. Louis*, 185 U. S., 44;

Carson v. *Dunham*, 121 U. S., 427-8;

Rand v. *Walker*, 117 U. S., 340;

Metcalf v. *Watertown*, 128 U. S., 586;

If the petition in the state court did not present a cause of action which involved a dispute or controversy as to the effect or construction of the Constitution or laws of the United States, the Circuit Court acquired no jurisdiction, and, within the rule announced by this court in the case of *Defiance Water Co.* v. *Defiance*, 191 U. S., 185-194, the judgment of the court below should be reversed.

Newburyport Water Co. v. *Newburyport*, 193 U. S., 576;

R. R. Co. v *Swan*, 111 U. S., 379-382;

Metcalf v. *Watertown*, 128 U. S., 586;

Morris v. *Gilmer*, 129 U. S., 315;

Bank v. *Buford*, 191 U. S., 119.

(See pages 37 to 45 of original brief filed herein.)

The fact that the defendant, in the state court, secured a removal of the cause to the Circuit Court, upon a mistaken view of the law, could not operate to give the Circuit Court jurisdiction, and the judgment rendered should be set aside and vacated, if it affirmatively appears that the cause was improperly removed.

Carson v. *Dunham*, 121 U. S., 427-428;

Wabash R. R. Co. v. *Barbour*, 73 Fed., 513, 514;

Postal Tel. v. *Alabama*, 155 U. S., 487;

Arkansas v. *Kan.*, 183 U. S., 185;

Boston v. *Montana*, 188 U. S., 639;

Wetmore v. *Rymer*, 169 U. S., 115;

Mexican R. R. v. *Davidson*, 157 U. S., 208;

Tenn. v. *Union Bank*, 152 U. S., 454, 460;

Ex parte Wisner, 203 U. S., 449.

FOURTH.

THE DECISION AND JUDGMENT OF THE CIRCUIT COURT OF APPEALS REVERSING THE JUDGMENT OF THE CIRCUIT COURT WAS NOT A FINAL JUDGMENT, WHICH COULD HAVE BEEN REVIEWED BY THIS COURT BY WRIT OF ERROR, CERTIORARI, OR OTHERWISE.

The learned counsel for appellee, in presenting the motion to dismiss the appeal from this court, has certainly overlooked Sections 5 and 6 of the Act of March 3d, 1891. (26 Stat., 827.)

By Section 6 it is provided, among other things, that:

> "The judgments and decrees of the Circuit Courts of Appeal shall be final in all cases in which the jurisdiction is *dependent entirely* upon the opposite parties to the suits or controversy, being aliens and citizens of the United States, or citizens of different states."

Nothing of this character appears in the record. Indeed, the very reverse appears. Therefore, the judgment of the Circuit Court of Appeals is not made final by the statute. The judgment, however, of the Circuit Court of Appeals conclusively shows that it was not intended to be final. The concluding part of the decision is that the judgment of the Circuit Court "be reversed, and the

cause remanded, with instructions to proceed in harmony with this opinion." (144 Fed., 622; Rec., p. 65.)

In the case of *Hazeltine* v. *Cent. Bank*, 183 U. S., 131, an attempt was made in this court to review a judgment of the Supreme Court of Missouri, in which it was ordered by said court that the judgment of the trial court be reversed, and the cause remanded "for further proceedings to be had therein, in conformity with the opinion of this court herein delivered."

In sustaining the motion to dismiss, this court said:

> "We have frequently held that a judgment reversing that of a court below, and remanding the case for further proceedings, is not one to which a writ of error will lie."
>
> *Great Western Tel. Co.* v. *Burnham*, 162 U. S., 339.

A similar ruling was made by this court in the case of *Schlosser* v. *Hemphill*, 198 U. S., 175.

In the case of *United States* v. *Krall*, 174 U. S., 385, it was said that:

> "On the face of the decree of the Circuit Court of Appeals in this case the judgment is not a final judgment, and the appeal must, therefore, be dismissed."

Appellant never had a chance to appeal until final

decree herein, because, until then, no judgment adverse to it had been rendered. Before that time a judgment against complainant had been rendered, from which he prosecuted an appeal to a court lacking jurisdiction. The conclusion of that court, thus lacking jurisdiction, was not binding upon defendant, appellant here. The appellant is now, for the first time, before a court competent to entertain its appeal on the subject of the jurisdictional incapacity of the Circuit Court.

Union & Planters Bank v. *Memphis*, 189 U. S., 71-74;

Scott v. *Laney*, 19 How. (U. S.), 427;

Pennoyer v. *Neff*, 95 U. S., 728;

Kimball v. *Kimball*, 174 U. S., 163;

FIFTH.

THIS COURT HAS JURISDICTION ON THIS APPEAL TO DETERMINE WHETHER THE CIRCUIT COURT, IN ENTERING THE FINAL DECREE, HAD JURISDICTION.

This appeal, taken under the Act of March 3rd, 1891, Section 5, provides:

> "That appeals or writs of error may be taken * * * from the existing Circuit Courts direct to the Supreme Court in the following cases: *In any case* in which the jurisdiction of the court *is in issue, etc.*"

There has never been any trial in the Circuit Court on the merits. The demurrer was sustained by the Circuit Court *solely* on the ground of jurisdiction. (See opinion of Circuit Court, Rec., pp. 47-48.) The Circuit Court of Appeals, as shown by the Record, reversed the judgment of the Circuit Court, upon questions never decided by the Circuit Court. The decision of the Court of Appeals was that the Constitution of the state ordained that complainant's right-of-way damages should be first paid, or secured to be paid, before right-of-way title could pass to the railroad company, and that the claim for such damages was properly enforcible in the state court from which the removal had been taken. If such were the case, it constituted, therefore, the strongest reason for denying federal

jurisdiction, because, diversity of citizenship not existing, and the case not arising, in the opinion of the court of appeals, under the Constitution, laws or treaties of the United States, the Circuit Court and equally the Circuit Court of Appeals, was absolutely without jurisdiction.

The question of jurisdiction was raised by the defendant (appellant) at every stage of the proceedings in the Circuit Court, and only that question, and there was at no time, either in the Circuit Court or in the Circuit Court of Appeals, any final judgment against it which could be reviewed, under the act of March 3d, 1891, by this court, by appeal or writ of error, or otherwise, until the final decree in the Circuit Court. There was no other question but that of jurisdiction in the Circuit Court, which it contested, or from which it could appeal, and the motion to dismiss (see motion) this appeal is for "the reason that all the matters sought to be reviewed in this court have been reviewed by the United States Circuit Court of Appeals for the Eighth Circuit, and decided adverse to said appellant company, *and said judgment has become final;*" and this notwithstanding that judgment remanded the cause, *"with instructions to proceed in harmony with this opinion."*

Schlosser v. *Hemphill*, 198 U. S., 175;

McLish v. *Roff*, 141 U. S., 661.

But does not the decision of this court in the case of *American Sugar, etc., Co.* v. *New Orleans*, 181 U. S., 277, settle the following propositions, viz.:

First. That the Circuit Court of Appeals had no appellate jurisdiction to review the judgment of the Circuit Court; and

Second. That the appellate jurisdiction of this court under the act of March, 1891, is exclusive?

The petition filed in the state court does not allege or claim that the plaintiff and defendant were citizens of different states. The amended complaint in the Circuit Court has no such allegation. The claim and cause of action is based and founded upon a decree of the federal court. On that ground it was removed to the federal court, as involving a construction of the Constitution and laws of the United States. Under such circumstances, has not this court decided (181 U. S., 277) *supra*, that its "*appellate jurisdiction is exclusive?*"

If the petition in the state court did not present a cause of action which involved a federal question, under the removal acts, the Circuit Court never acquired jurisdiction. If it did present such cause of action, and was properly removed, there being no diversity of citizenship, the Circuit Court of Apppeals had no appellate jurisdiction; for, as said by this court *in re* 181 U. S., 281, if,

under such circumstances, it did have appellate jurisdiction, "the right to two appeals would exist in every case * * * where the jurisdiction of the Circuit Court rested solely on the ground that the suit arose under the Constitution, laws or treaties of the United States, if such cases could be carried to the Circuit Court of Appeals, for their decisions would not come within the category of those made final," and therefore this court held that, "as those cases fall strictly within the terms of Section Five, the *appellate jurisdiction of this Court in respect of them is exclusive.*"

If the Circuit Court of Appeals had no appellate jurisdiction—which would seem clear from this decision—what, then, is the status of the judgment of the Circuit Court sustaining the demurrer to the bill of complaint? Has that judgment been reversed?

In the case of *Martin* v. *Hunter*, 1 Wheat. (U. S.), 364, it was said by Justice Story, speaking for the court, that:

> "It is an acknowledged principle, I believe, by every court in the world that not only the decisions but everything done under the judicial process of courts not having jurisdiction, are *ipso facto* void."
>
> *Earle* v. *McVeigh*, 91 U. S., 507.

In the case of *Williamson* v. *Berry*, 8 How. (U. S.), 543, it was said that:

"The rule is that where a limited tribunal takes upon itself to exercise a jurisdiction which does not belong to it, its decision amounts to nothing, *and does not create a necessity for appeal.*"

The parties could not consent to give the Circuit Court of Appeals appellate jurisdiction where it had not been conferred by statute.

Cutler v. *Rae*, 7 How. (U. S.), 731;
Gruner v. *U. S.*, 11 How. (U. S.), 164;
People's Bank v. *Calhoun*, 102 U. S., 260.

It has been uniformly held by the Circuit Courts of Appeal that such courts do not have jurisdiction to directly review a judgment of a Circuit Court which sustains an objection to its jurisdiction, and dismisses the suit on that ground.

St. L. C. C. Co. v. *A. L. Co.*, 125 Fed., 196;
The Alliance, 70 Fed., 273; 17 C. C. A., 124;
The Annie Faxon, 87 Fed., 963; 31 C. C. A., 325;
Mnfg. Co. v. *Barber*, 60 Fed., 465; 9 C. C. A. 79;
United States v. *Sutton*, 47 Fed., 129; 2 C. C. A., 115;
Cabot v. *McMaster*, 65 Fed., 533; 13 C. C. A., 39;
Excelsior W. P. Co. v. *Pac. B. Co.*, 109 Fed., 497; 48 C. C. A., 349;
Dudley v. *Board*, 103 Fed., 209; 43 C. C. A., 184;

Hays v. *Richardson*, 121 Fed., 536; 57 C. C. A., 598;

Evans, etc., Co. v. *McCaskill*, 101 Fed., 658; 41 C. C. A., 577;

In re Aspinwall's Estate, 90 Fed., 675; 33 C. C. A., 217;

United States v. *Sutton*, 47 Fed., 129; 2 C. C. A., 115;

Halpin v. *American*, 138 Fed., 548; 70 C. C. A., 462.

The first sentence of the opinion of the Circuit Court of Appeals (144 Fed., 622) discloses the fact that it did not have any jurisdiction, under the act of March 3d, 1891, and under many decisions of this court, and previous decisions of the Court of Appeals rendering the decision (125 Fed., 196), the Court of Appeals had no jurisdiction to review the judgment of the court below.

SIXTH.

THE DECISIONS RELIED UPON IN SUPPORT OF MOTION TO DISMISS HAVE NO APPLICATION TO THE FACTS OF THIS CASE.

The *sole* ground upon which motion to dismiss is based is that, because appellee took an appeal to the Circuit Court of Appeals, the appellant is now and thereby estopped from prosecuting this appeal from the final judgment of the Circuit Court. In each case referred to the appellant to this court had also prosecuted an appeal to the Circuit Court of Appeals, and in each case this court decided, as we read the decisions referred to in support of this motion, that the Circuit Court of Appeals not only had jurisdiction of the cause, but also power, under the act of March 3d, 1891, to render a final judgment in that court.

In this case there was no such appellate jurisdiction, and no such power, and no such judgment was, *in fact*, by it rendered.

We respectfully ask that the motion to dismiss be denied, and that the judgment of the Circuit Court be reversed, and such other order made as to this court may seem proper.

BALIE P. WAGGENER,
Attorney for Appellant.

IN THE SUPREME COURT OF THE UNITED STATES.

THE KANSAS CITY NORTHWESTERN RAILROAD COMPANY,

Appellant,

vs.

FREDERICK ZIMMERMAN, AS ADMINISTRATOR OF L. ZIMMERMAN, DECEASED,

Appellee.

STATEMENT OF CASE.

For the convenience of the Court, the pleadings in this case will be hereinafter copied in full.

The appellee, on the 21st day of May, 1899, instituted his action in the District Court in and for the County of Leavenworth, State of Kansas, against the Kansas City Northwestern Railroad Company and the City of Leavenworth, by filing his petition, a copy of which is in words and figures as follows, to-wit:

STATE OF KANSAS, *Leavenworth County,* ss:

In the District Court in and for said County.

FREDERICK ZIMMERMAN, Administrator of the Estate of L. Zimmerman, Deceased, Plaintiff,

vs.

KANSAS CITY NORTHWESTERN RAILROAD COMPANY and THE CITY OF LEAVENWORTH, Defendants.

Petition.

The above named plaintiff complains of the above named defendants and for cause of action against them and each of them alleges: that he is the duly appointed, acting and qualified Administrator of the estate of Leonard Zimmerman, deceased, and that the Kansas City Northwestern Railroad Company is a railroad corporation duly organized and existing under and by virtue of the laws of the State of Kansas, and owns a railroad, engines, cars, etc., and is operating the same into and through the county and city of Leavenworth and through other counties and Cities in said state; that the said city of Leavenworth is a municipal corporation and city of the first class, under the laws of said State, and has been such during all the times herein mentioned.

Plaintiff further avers that on the 8th day of October, 1872, the Kansas City, Wyandotte & Northwestern Railway Company, a corporation, was duly organized and chartered for the purpose of constructing and maintaining a railroad and telegraph lines in connection therewith and the business of said railway company was to be transacted in the counties in the State of Kansas through which said railroad and telegraph lines passed; and that on the 27th day of September, 1886, the Leavenworth & Olathe Railroad Company, a corporation, was

duly organized and chartered for the purpose of constructing and maintaining and operating a standard and broad guage railroad extending and intended to be run through and from the city of Leavenworth, in the county of Leavenworth, Kansas, then southwesterly through the counties of Leavenworth, Wyandotte and Johnson to the city of Olathe in the last named county.

Plaintiff further avers that after the organization and chartering of the aforesaid companies, they proceeded to condemn, lay out a right of way, and build a railroad through and into the city and county of Leavenworth; that before the completion thereof and to-wit, on the 29th day of March, 1887, the said Kansas City, Wyandotte & Northwestern Railway Company and the Leavenworth & Olathe Railroad Company consolidated under the laws of the State of Kansas, as The Kansas City, Wyandotte & Northwestern Railroad Company, and in the articles of consolidation, the Kansas City, Wyandotte & Northwestern Railroad Company in writing accepted all the rights and privileges, and assumed all the obligations and liabilities of every nature and kind of the aforesaid companies, the Kansas City, Wyandotte & Northwestern Railway Company and the Leavenworth & Olathe Railroad Company; that thereafter said Kansas City, Wyandotte & Northwestern Railroad Company took charge of all the property of the aforesaid two companies, accepted all the rights, franchises and privileges and assumed all the obligations and liabilities of the aforesaid two companies, and proceeded to complete, construct and build said railroad.

Plaintiff further avers that said Leonard Zimmerman in his life time was the owner of fractional lot seven (7) in block seven (7) and lots six (6) and seven (7) in block eight (8) all in Fackler's Addition to the City of Leavenworth, Leavenworth county, Kansas; that Second street

was a duly laid out and established graded street in the city of Leavenworth, running North and South, and running between blocks seven (7) and eight (8) block seven (7) lying on the East side of said Second street, and block eight (8) on the West side of said Second street; that said Zimmerman's property, to-wit, lot seven (7) faces Second street on the East and that said lot six (6) and fractional lot seven (7) faces said Second street on the west.

Plaintiff further avers that said Kansas City, Wyandotte & Northwestern Railroad Company, after acquiring the rights as aforesaid, proceeded to finish, construct, and build its road in a north-easterly direction through the city of Leavenworth until it came to a point on the south line of fractional lot seven (7) of said L. Zimmerman's property and then without any right or authority, and without condemning the same, appropriated a part and portion of said fractional lot seven (7) and constructed its railroad in the same direction across and over that part or portion of said Second street immediately in front of said L. Zimmerman's property mentioned aforesaid; graded, raised and made a high embankment of a permanent nature and placed rails thereon the whole width of said street and thereby changed and raised the established grade of said Second street to a great height immediately in front of the above described property, and seriously and permanently impaired the egress and ingress to and from said property, and thereby damaging him in a great sum of money; as will more fully appear hereinafter.

Plaintiff further avers that on the 2nd day of February, 1889, said L. Zimmerman, deceased, began his action against said Kansas City, Wyandotte & Northwestern Railroad Company, in the District Court of Leavenworth county, Kansas, to recover damages for the aforesaid wrongs, and that on the 15th day of May, 1897, he duly recovered

in the above entitled court and cause judgment against the defendant, said Kansas City, Wyandotte & Northwestern Railroad Company for the sum of Three thousand dollars ($3,000.00), which judgment is unappealed from, unreversed, and now of full force and effect; all of which will more fully appear from a true copy of said judgment, hereto attached, made part hereof and marked "Exhibit A."

Plaintiff further avers that afterwards and on the 7th day of May, 1898, said judgment was duly revived in the name of Frederick Zimmerman, Administrator of the estate of Leonard Zimmerman, deceased; all of which will more fully appear from a true copy of the judgment order of revivor hereto attached, made a part hereof and marked 'Exhibit B."

Plaintiff further avers that during this time and about January 2, 1888, the said Kansas City, Wyandotte & Northwestern Railroad Company mortgaged its said road, franchise and equipments to the Farmers' Loan & Trust Company of New York, and that on or about March 21, 1890, the said Trust Company began its action in the Circuit Court of the United States for the District of Kansas, to foreclose its said mortgage, and that on or about the 18th day of June, 1891, a decree was entered against said Kansas City, Wyandotte & Northwestern Railroad Company foreclosing said mortgage and ordering said property to be sold unless within some short time thereafter, in said decree mentioned, said railroad company, or some person or persons for them, should pay the amount of said mortgage indebtedness, with the expense and costs thereof, and that on or about the — day of —— 189— said railroad company and all its equipments, appurtenances, etc., were ordered to be sold and were on or about the — day of —— 189— duly sold to the defendant, the Kansas City,

Northwestern Railroad Company, and that said defendant became the successor in interest to all the rights, franchises and privileges of said Kansas City, Wyandotte & Northwestern Railroad Company, and as part of the consideration assumed and was subject to all the liabilities of the Leavenworth & Olathe Railroad Company and the Kansas City, Wyandotte & Northwestern Railway Company *and the Kansas City, Wyandotte & Northwestern Railroad Company,* under and by virtue of said decree and purchase.

Plaintiff further avers that on the 17th day of November, 1886, the aforesaid Leavenworth & Olathe Railroad Company procured the Mayor and Council of the City of Leavenworth, Kansas, to pass an ordinance granting to said railroad company certain right of way privileges in the city of Leavenworth, and that in said ordinance said Leavenworth & Olathe Railroad Company was granted the right to cross Second street at some point south of the north line of Maple street; also over the South levee Front street, and the South Esplanade from the South line of Fackler's Addition to the North line of Spruce, etc., and that as a condition for the grant and privilege mentioned in said ordinance, it was provided that in all such cases "where the grade of any street or public ground is changed by said company or its successors it shall protect the City from cost and damage at the suits of the property owners;" all of which will more fully appear by a true copy of said ordinance, hereto attached and made part hereof and marked "Exhibit C."

Plaintiff further avers that on or about the 19th day of January, 1887, said Leavenworth & Olathe Railroad Company accepted the terms and agreed to the conditions provided and mentioned in said ordinance; and that in and by the articles of consolidation mentioned aforesaid, the Kansas City, Wyandotte & Northwestern

Railroad Company, assumed, accepted and agreed to all the terms, obligations and conditions of said ordinance, and that under and by virtue of the decree of foreclosure and the purchase aforesaid and of accepting and operating said railroad under and by virtue of the ordinances of said city and its agreement to save the City of Leavenworth harmless from all damages sustained by property owners by reason of the construction of the railroad aforesaid, said defendant, the Kansas City, Northwestern Railroad Company has become liable to said plaintiff for the amount of said judgment with interest and costs.

Plaintiff futher avers that long before the above judgment was obtained all the property of the Kansas City, Wyandotte & Northwestern Railroad Company was under and by virtue of said decree sold to said defendant herein, the Kansas City, Northwestern Railroad Company, and that under and by virtue of said decree and the ordinances of said city, said defendant Kansas City, Northwestern Railroad Company assumed and agreed to pay off any and all obligations of the Kansas City, Wyandotte & Northwestern Railroad Company, and that under and by virtue thereof the Kansas City, Wyandotte & Northwestern Railroad Company has turned over to said defendant railroad company all of its property rights and franchises, and has no property of any kind or description subject to execution, and has refused to pay any part or portion of said judgment, and that the same cannot be made on execution or by any means or process against the Kansas City, Wyandotte & Northwestern Railroad Company, and that said Kansas City, Wyandotte & Northwestern Railroad Company and defendant Kansas City, Northwestern Railroad Company neglect and refuse to pay the aforesaid judgment or any part thereof, although often thereunto requested.

Plaintiff further avers that said defendant, the City of

Leavenworth, is permitting, aiding and assisting the Kansas City Northwestern Railroad Company, its co-defendant herein, in the operation and maintenance of said railroad within said city in violation of the plaintiff's rights and in violation of said ordinance and of the ordinances of said city, and that it is permitting and aiding and assisting its co-defendant herein to run across said Second street and to maintain its embankments and tracks above the established grade of said Second street to the height of two or three feet or more; all in violation of the aforesaid ordinance and the ordinances of said city, well knowing that the said defendant company, or any person or persons for them, neglect and refuse to pay the aforesaid mentioned judgment or any part thereof, or to duly compensate the property owners for damages they may have sustained by reason of the construction of said railroad, and which said railroad companies, its successors and assigns, have agreed to pay when they accepted the privileges and benefits of said ordinance.

Wherefore plaintiff prays and demands judgment against the defendants, the Kansas City, Northwestern Railroad Company and the City of Leavenworth, for the sum of $3,000.00 with interest at the rate of six per cent, per annum from the 15th day of May, 1897, until paid, and for cost of suit.

Plaintiff further prays that said defendant, the Kansas City, Northwestern Railroad Company, be permanently enjoined and restrained from operating its said railroad over that part or portion of defendant's land appropriated as aforesaid, and from operating and maintaining said embankment across said Second street in front of plaintiff's property until it pays or some person or persons for them the aforesaid mentioned judgment and compensate said plaintiff for the damages and property taken by the afore-

said mentioned railroads, and for all such other and further relief in the premises as plaintiff may be entitled to.

JNO. H. ATWOOD &
W. W. HOOPER.
Attorneys for Plaintiff.

"EXHIBIT A."

Ordinance No. 1296.

An Ordinance Granting Certain Rights of Way and Privileges to the Leavenworth & Olathe Railroad Company.

Be it ordained by the Mayor and Councilmen of the City of Leavenworth, Kansas:—

SECTION 1. That the right to construct and operate a single line of railway track be and is hereby granted to the Leavenworth & Olathe Railroad Company for a period of 20 years from and after the passage of this ordinance, over and upon the following streets and public grounds of the city of Leavenworth, to-wit: Across Limit street on the Southern boundary of the city; also across Second street at some point south of the north line of Maple street; also over the south levee, Front street, and South Esplanade, from the south line of Fackler's addition to the north line of Pine street; also across Spruce and Olive streets, east of Main street, and also across all other public grounds east of Main street, from the north line of Olive street, northward to a point north of Choctaw street, to connect with the tracks of the Leavenworth Depot and Railroad Company.

SECTION 2. That the grant herein made is upon the following conditions: The right is reserved and given to the Mayor and council of this city to allow other railroad companies to use the right of way of the Leavenworth & Olathe Railroad Company from said Limit street to said point of connection with the track of said Leavenworth Depot & Railroad company and any track laid on said

right of way, such company or companies to pay the Leavenworth & Olathe Railroad Company a proportionate amount of the costs of the construction and maintenance of the same, and of the cost of such right of way. All differences between said companies as to the amount to be paid, and the manner of use, to be determined by representatives, one to be selected by each company and in case such two representatives cannot agree thereon, or said Leavenworth & Olathe Railroad company neglects to name its representative, then the mayor and council of this city shall designate another arbitrator, who shall act with the others in determining the points of difference. Said Leavenworth & Olathe Railroad Company in crossing said streets shall so grade the approach on each side of its track as to permit easy and safe crossing of the same, and when practicable, shall pass under the grade of the street and shall bridge such cut for the passage of pedestrians and vehicles on the street. In all such cases where the grade of any street or public ground is changed by said company, it shall protect the city from cost and damage at the suits of property owners. All questions as to the manner of construction of said railroad over the right of way herein granted and concerning the protection of the streets and public grounds, and the safety and convenience of the passage of people and vehicles over the same shall be determined by the engineer of said company and the city engineer, and the differences between them shall be determined by the mayor and council of this city. Unless said company shall construct and operate its track over the right of way herein granted within one year from the passage of this ordinance, all rights under this ordinance shall be forfeited without further action on the part of the city.

Provided that if said company shall be delayed in the construction of its said road in the city of Leavenworth

by an injunction or other litigation, the time that said company shall be so delayed shall not be computed as a part of the year within which it is required to construct and operate over the right of way herein granted, but said company shall have within which to construct its said track one year exclusive of the time it may be so delayed by injunction or other litigation. Said company shall, by writing, accept the terms and conditions of this ordinance within twenty days from the passage thereof.

SECTION 3. That this ordinance shall take effect and be in force from and after its approval and publication.

Approved November 17th, A. D. 1886.

S. F. NEELY, *Mayor.*

Attest:

WM. SHEPHERD, *City Clerk.*

Passed November 17th, A. D. 1886.

Published November 18th, A. D. 1886.

And thereafter, in due time, the plaintiff in error, The Kansas City Northwestern Railroad Company, duly filed its petition for removal to the Circuit Court of the United States in and for the District of Kansas, a copy of which said petition is in words and figures as follows, to-wit:

In the District Court of Leavenworth County, Kansas.

FREDERICK ZIMMERMAN, Administrator of the Estate of L. Zimmerman, Deceased, Plaintiff,

vs.

THE KANSAS CITY NORTHWESTERN RAILROAD COMPANY, and THE CITY OF LEAVENWORTH, Defendants.

Petition for Removal.

To the Honorable The District Court of Leavenworth County, Kansas:

Your petitioner, The Kansas City Northwestern Rail-

road Company, respectfully shows to this honorable court that the matter and amount in dispute in the above entitled cause exceeds, exclusive of interest and costs, the sum of $2.000.

Your petitioner further shows that it appears from the plaintiff's petition filed herein, that on January 2nd, 1888, The Kansas City, Wyandotte & Northwestern Railroad Company, mortgaged its road, franchises and equipment to The Farmers' Loan & Trust Company, of New York, and that on or about the 21st day of March, 1890, the said The Farmers' Loan & Trust Company of New York began its action in the Circuit Court of the United States, for the District of Kansas, to foreclose said mortgage, and that on or about the 18th day of June, 1891, a decree was duly entered against the said, The Kansas City, Wyandotte & Northwestern Railroad Company, foreclosing said mortgage, and ordering said property to be sold; and that thereafter the said property of said, The Kansas City, Wyandotte & Northwestern Railroad Company was duly sold, and the sale was thereafter duly confirmed; and that the said, The Kansas City Northwestern Railroad Company, the defendant herein, became the successor in interest to all the rights, franchises and privileges of said, The Kansas City, Wyandotte & Northwestern Railroad Company, and as a part of the consideration assumed and was subject to all the liabilities of the Leavenworth & Olathe Railroad Company, and The Kansas City, Wyandotte & Northwestern Railroad Company, and The Kansas City, Wyandotte and Northwestern Railroad Company, under and by virtue of said decree and purchase; and the said plaintiff bases his cause of action upon said decree of the Circuit Court of the United States, for the District of Kansas, and upon the constitution and laws of the United States, and that to determine said above cause involves the

construction of said decree, and of the Constitution and of the laws of the United States; and that said above entitled cause is one growing out of said decree and of the sale of the property of the said, Kansas City, Wyandotte & Northwestern Railroad Company to this defendant, which said decree was entered in said cause pending between said, The Farmers' Loan & Trust Company of New York, and The Kansas City, Wyandotte & Northwestern Railroad Company, in the Circuit Court of the United States for the District of Kansas, and involves the construction of said decree and the constitution and laws of the United States.

And your petitioner further shows that the said above entitled suit can be fully and justly determined as between said plaintiff and this petitioning defendant if the same shall be removed to the Circuit Court of the United States for the District of Kansas; and that said controversy between the plaintiff herein and this defendant is a separable controversy, with respect to which separable controversy, the City of Leavenworth, being defendant in the above entitled cause, has no concern; and your petitioner offers herewith a good and sufficient bond for its entering into the Circuit Court of the United States in and for the District of Kansas, First Division, on the first day of the next session a copy of the record in this suit, and for paying all costs that may be awarded by said Circuit Court if said Court shall hold that this suit was wrongfully or improperly removed thereto.

And your petitioner prays this honorable court to proceed no further herein, except to make the order of removal required by law, and to accept the said surety upon the bond, and to cause the said record herein to be removed to the Circuit Court of the United States in and for the District of Kansas, First Division, and your petitioner will ever pray.

WAGGENER, HORTON & ORR,
Attorneys for Defendant, The Kansas City Northwestern Railroad.

STATE OF KANSAS, *County of Atchison, ss*:

W. P. Waggener, being first duly sworn, deposes and says that he is one of the duly authorized attorneys for the defendant, The Kansas City Northwestern Railroad Company; that he has read the within and foregoing petition for removal, and that the matters and things therein stated are true.

W. P. WAGGENER.

Subscribed and sworn to before me this 20th day of June, A. D. 1899.

[SEAL.] S. E. HARBURGER,
Notary Public.

My Commission expires on the 26th day of March, A. D. 1901.

together with a proper bond for removal.

The record was transferred to the Circuit Court of the United States for the District of Kansas, and thereafter, on the 11th day of October, 1899, the plaintiff in said action filed motion in the Circuit Court for permission to amend the petition filed in the state court so that it might conform to the forms of equity pleadings and practice in said Circuit Court, which was allowed.

In pursuance of such motion, plaintiff in error filed its amended bill, which will be found on pp. 17-23 of Transcript of Record. A demurrer was filed to this amended bill, and, on the 18th day of April, 1901, the same was sustained (Transcript of Record, p. 30), and leave was given to file another amended bill of complaint, which was accord-

ingly done, a copy of which is in words and figures as follows, to-wit:

In the Circuit Court of the United States for the District of Kansas, First Division.

FREDERICK ZIMMERMAN, Administrator of the Estate of L. Zimmerman, Deceased, Plaintiff,

vs.

THE KANSAS CITY NORTHWESTERN RAILROAD COMPANY, Defendant.

Amended Bill of Complaint.

To the Honorable Judges of the Circuit Court of the United States for the District of Kansas, First Division:

1. Your complainant, Frederick Zimmerman, Administrator of the estate of L. Zimmerman, deceased, and a resident and citizen of Kansas, brought his action in the District Court of Leavenworth county, against the above named defendant, The Kansas City, Northwestern Railroad Company, and the City of Leavenworth, also residents and citizens of the State of Kansas, and upon the petition of the defendant, The Kansas City, Northwestern Railroad Company, claiming that this controversy involved the construction of orders, judgments and decrees of this court rendered and entered in the case of the Farmers' Loan & Trust Company of New York, against the Kansas City, Wyandotte & Northwestern Railroad Company, being case numbered —— of this court, the same was ordered removed from the District court of said county to this Circuit Court of the United States for the District of Kansas, and a transcript of the record of said District court was filed in said Circuit Court on the 18th day of July, 1899, and as-

Second Street was a duly laid out and established graded street in said City of Leavenworth, running north and south, and running between Blocks seven (7) and eight (8); Block seven (7) lying on the east side of Second Street; and Block eight (8) on the west side of said Second street; that said Zimmerman's property, to-wit: Lot seven (7) faces Second Street on the east, and said lot six (6) and fractional Lot seven (7) face said Second Street on the west, and that said Zimmerman owned said lots, and the grade of said street was established long prior to the acquiring of any right of way by said companies, or either of them.

6. Your complainant further avers that said Kansas City, Wyandotte & Northwestern Railroad Company, after acquiring the rights aforesaid, proceeded to finish, construct and build its road in a northeasterly direction through the City of Leavenworth until it came to a point on the south line of fractional lot seven (7) of said Zimmerman's property, and then without any right or authority, and without condemning the same, appropriated a part and portion of said fractional Lot seven (7) and constructed its railroad in the same direction across and over that part and portion of said Second Street immediately in front of said L. Zimmerman's property mentioned aforesaid, graded, raised and **made a high embankment of a permanent nature the whole** width of said Second Street, and placed iron rails thereon, and thereby changed and raised the established grade of Second street, as long prior thereto established by said City of Leavenworth, to a great height, to-wit, three feet, immediately in front of the above described property, and seriously and permanently impaired the egress and ingress to and from said property, and thereby damaging him in a great sum of money, as will more fully appear hereafter.

7. Your complainant further avers that on the 2d

day of February, 1889, said L. Zimmerman, now deceased, began his action against said Kansas City, Wyandotte & Northwestern Railroad Company, in the District Court of Leavenworth county, Kansas, to recover damages for the aforesaid wrongs, and that on the 15th day of May, 1897, he duly recovered in the above entitled court and cause judgment against the defendant, said Kansas City, Wyandotte & Northwestern Railroad Company, for the sum of Three Thousand Dollars ($3,000.00), with interest thereon from said date at the rate of 6 per cent. per annum until paid, for damages sustained by reason of the appropriation of his land, and the construction of the railroad as aforesaid, which judgment is unappealed from, unreversed, and now of full force and effect; all of which will more fully appear from a true copy of said judgment, hereto attached, made part hereof and marked "Exhibit A."

8. Your complainant further avers that afterwards and on the 7th day of May, 1898, said action and judgment was duly revived, as provided by law, in the name of Frederick Zimmerman, Administrator of the estate of Leonard Zimmerman, deceased; all of which will more fully appear from a true copy of the judgment order of revivor hereto attached, made a part hereof, and marked "Exhibit B." Your complainant further avers that during this time, and about January 2, 1888, the Kansas City, Wyandotte & Northwestern Railroad Company executed and delivered to the Farmers' Loan & Trust Company of New York a deed of trust, or mortgage, on its said railroad, right of way, tracks, equipments and franchises, that is, such of its said railroad, right of way, tracks, improvements, equipments and franchises as it owned, and had paid for and acquired at the time of the execution of said deed of trust, or mortgage.

9. And your complainant further avers that at the

time of the execution and delivery of said deed of trust, or mortgage, to said Farmers' Loan & Trust Company of New York, the said Kansas City, Wyandotte & Northwestern Railroad Company had not acquired the title to the right of way over the land and the street immediately in front of said premises appropriated as aforesaid, and had not compensated said property owner for the damages sustained by him as aforesaid, and that at the time of the execution of said deed of trust, or mortgage, the said Kansas City, Wyandotte & Northwestern Railroad Company had no title to said right of way, and could not give any lien thereon that was prior and paramount to the claim and lien of said L. Zimmerman, for compensation for the land appropriated and damages sustained by him as above stated, and that the said Farmers' Loan & Trust Company did not, under and by virtue of their deed of trust, or mortgage, acquire any lien, right or title that is prior to the lien, claim and right of said plaintiff, to be compensated for his land appropriated and the damages sustained by him as above stated.

10. Your complainant further avers that on or about March 31st, 1890, the said Farmers' Loan & Trust Company of New York commenced its action in the Circuit Court of the United States for the District of Kansas, to foreclose its said deed of trust, or mortgage, and that on or about the 18th day of June, 1893, a decree was entered against said Kansas City, Wyandotte & Northwestern Railroad Company, foreclosing said deed of trust, or mortgage, and ordering that said property, described in said deed of trust or mortgage be sold, unless, within some short time thereafter in said decree mentioned, said railroad company, or some person or persons for it, should pay the amount of said mortgage indebtedness, with the expenses and costs thereof; that thereafter and on or about the —

day of ——, 1894, said property was sold to George C. Smith and B. P. Waggener, who were the agents and purchasing trustees for the said defendant Company.

11. Your complainant further avers that after making of said sale, the Master making the same duly made his report thereon, and on the 9th day of April, 1894, upon the consideration of such report, said sale was confirmed by said court and which said order of confirmation, among other matters, contained the followiing provision:

"And said master commissioner is ordered and directed to make the purchasers at said sale, to-wit, George C. Smith and B. P. Waggener, purchasing trustees, a good and sufficient deed, conveying the property mentioned and described in said report to such purchasers, said report being confirmed, however, subject to the provisions of said original decree, and subject to the provisions to be contained in the deed executed by said master commissioner to said purchasers."

12. Your complainant further avers that afterwards, and in consummation of said sale, a deed was executed by the master to said George C. Smith and B. P. Waggener, the purchasers at said sale, conveying to them the premises mentioned in said foreclosure decree, which deed was on the 18th day of June, 1894, approved by the court subject to certain conditions set forth in the order of approval, which order was written, or a part thereof, upon the original deed, and is in the following words and figures.

"The foregoing deed examined and approved subject to the condition that the purchaser take the property subject to all orders of the court relating to the payment of the debts of the company, and the receiver, and said property shall remain liable for such debts, if any there are remaining unpaid."

HENRY C. CALDWELL,
U. S. Circuit Judge.

which deed was thereupon entered upon the records in the office of the Register of Deeds of Leavenworth County, Kansas, and thereafter said George C. Smith and B. P. Waggener conveyed said property to the defendant, The Kansas City, Northwestern Railroad Company, for whom they were acting as Trustees, and your complainant further avers that said company has no right, title or interest in or to such property save and except as it acquired by said conveyance.

13. Your complainant further avers that said B. P. Waggener, one of the purchasing Trustees at such foreclosure sale, was at the time of the beginning of the foreclosure proceedings mentioned above, and at the time of purchasing the property at such sale, the general attorney and counsellor for the Kansas City, Wyandotte & Northwestern Railroad Company, and was one of the attorneys of record for the defendant in the action in which said L. Zimmerman, now deceased, recovered judgment against the Kansas City, Wyandotte & Northwestern Railroad Company, as mentioned above, and at the execution and approval of the deed conveying to the said trustees said premises and the deed to said defendant, was still such attorney, and had actual knowledge of the pendency of said action in the District Court of Leavenworth County, Kansas, and of the nature and extent thereof, and what was claimed by said plaintiff in said action, and well knew that said plaintiff had not been compensated for his land appropriated and the damages sustained by him in such appropriation, and the construction of such embankment, and the changing of the established grade of such street immediately in front of said premises, and said trustees, nor said defendant company, are not innocent purchasers of said right of way, etc., for value, they at all times having knowledge and notice of said plaintiffs' claims.

14. Your complainant further avers that he is the representative of judgment creditor of the Kansas City, Wyandotte & Northwestern Railroad Company, and one of the persons in whose favor the reservation and provision as embodied in the orders, decrees, judgments, orders of confirmation and deed mentioned aforesaid, and said orders, decrees, judgments, order of confirmation, and deed are records of this court, and complainant refers to them and prays that he may use them as part hereof, or so much thereof as is deemed pertinent to the issues herein, as if they had been fully set out.

15. Your complainant further avers that on this 17th day of November, 1886, the aforesaid Leavenworth & Olathe Railroad Company procured the Mayor and Council of the City of Leavenworth, Kansas, to pass an ordinance granting to said railroad company certain right of way privileges in the City of Leavenworth, and that in said ordinance said Leavenworth and Olathe Railroad Company was granted the right to cross Second Street at some point south of the north line of Maple Street; also over the south levee, Front street, and the south Esplanade, from the south line of Fackler's Addition to the north line of Spruce, etc., and that as a condition for the grant and privilege mentioned in said ordinance, it was provided that in all such cases "where the grade of any street or public ground is changed by said company or its successors, it shall protect the City from cost and damage at the suits of the property owners;" all of which will more fully appear by a true copy of said ordinance hereto attached and made a part hereof and marked "Exhibit C."

16. Your complainant further avers that on or about the 19th day of January, 1887, said Leavenworth & Olathe Railroad Company accepted the terms and agreed to the conditions provided and mentioned in said ordinance;

and that in and by the articles of consolidation mentioned aforesaid, The Kansas City, Wyandotte & Northwestern Railroad Company assumed, accepted and agreed to all the terms, obligations and conditions of said ordinance and that under and by virtue of taking possession of said railroad and its tracks, and continuing to operate the same over said plaintiff's premises appropriated and taken as aforesaid, the decree of foreclosure and the purchase aforesaid, and of accepting and operating said railroad under and by virtue of the ordinance of said city and its agreement to save the City of Leavenworth harmless from all damages sustained by property owners by reason of the construction of the railroad aforesaid, said defendant, The Kansas City Northwestern Railroad Company, has become liable to said plaintiff for the amount of said judgment, with interests and costs.

17. Your complainant further avers that long before the above judgment was obtained all the property of the Kansas City, Wyandotte & Northwestern Railroad Company was under and by virtue of said decree sold to said defendant herein, The Kansas City Northwestern Railroad Company, and that under and by virtue of taking possession of the right of way and operating its trains and cars over the land appropriated and across said street immediately in front of said premises, and continuing to keep possession and operating its trains thereon, and of said decrees and the ordinances of the said city, said defendant, The Kansas City Northwestern Railroad Company, has assumed and become obligated to pay off any and all obligations of the said Kansas City, Wyandotte & Northwestern Railroad Company to said plaintiff for its right of way, and that under and by virtue thereof, the Kansas City, Wyandotte & Northwestern Railroad Company has turned over to said defendant railroad company all of its property rights and

franchises, and has no property of any kind or description subject to execution, and has refused to pay any part or portion of said judgment, and that the same cannot be made on execution or by any means or process against the Kansas City, Wyandotte & Northwestern Railroad Company, and that the said Kansas City, Wyandotte & Northwestern Railroad Company, and defendant, Kansas City Northwestern Railroad Company, neglect and refuse to pay the aforesaid judgment or any part thereof, although often thereunto requested.

In consideration whereof and for as much as your orator is remediless in the premises at and by the strict rule of the common law, and is only relievable in a court of equity where matters of this kind are properly recognizable and reviewable:

To The End, Therefore, that your orator may have that relief which he can only obtain in a court of equity, and that the said defendant may answer the premises, but not upon oath or affirmation, the benefit of which is expressly waived by your orator, now prays the court that a decree be rendered against the defendant, the Kansas City Northwestern Railroad Company, for the sum of Three Thousand Dollars ($3,000.00), with interest thereon at the rate of six per cent. per annum from the 15th day of May, 1897, until paid, and for costs of suit, and your complainant further prays that said defendant, The Kansas City, Northwestern Railroad Company, be required to pay the amount aforesaid, within some short time to be mentioned in said decree, and that if it fails to so do, that a Receiver be appointed to take charge of its property, railroad cars, franchises, equipments, etc., and to manage, collect and run same under the order of the court, until sufficient funds have been collected to pay said amount, with interest thereon as aforesaid, or that it be permanently enjoined and restrained from operat-

ing its said railroad over that part or portion of plaintiff's land appropriated as aforesaid, and from operating and maintaining said embankment across said Second street in front of said plaintiff's property until it pays, or some person or persons for them, the aforesaid mentioned amount, and compensate said plaintiff for the damage and property taken by the aforesaid mentioned railroad company, and which obligations the said defendant in its purchase, and otherwise, assumed, and that if it is found in determining and adjudicating the rights of the parties hereto that other persons, parties, or corporations, have some interest herein and that they are necessary parties to a complete adjudication and decision of the matters hereof, that they be brought into court and made parties defendant, and be required to set up their claim, if any, and have all their rights and interests in the premises adjudicated and that they be declared junior and inferior to the rights, claims and demands of the plaintiff herein, and for all such other and further relief, as in equity and good conscience the plaintiff may be entitled to in the premises.

WILLIAM W. HOOPER,
Solicitor for Plaintiff.

JNO. H. ATWOOD,
Of Counsel.

To the end that your orator may obtain the relief to which he is justly entitled in the premises, he now prays the court to grant him due process by subpœna directed to the Kansas City Northwestern Railroad Company, defendant hereinbefore named, requiring and commanding it to appear herein and answer, but not under oath, the same being expressly waived, the several allegations in this your orator's bill of complaint contained.

——— ———,
Solicitor for Plaintiff.

——— ———,
Of Counsel.

UNITED STATES OF AMERICA, *District of Kansas, ss*:

On this 8th day of May, 1901, before me personally appeared Frederick Zimmerman, the above named plaintiff, who made solemn oath that he read the foregoing amended bill of complaint and knows the contents thereof, and that the same is true, of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

FREDERICK ZIMMERMAN.

Subscribed and sworn to before me this 8th day of May, 1901.

[SEAL.] J. H. ATWOOD, JR.,
Notary Public.

My Commission expires Dec. 26th, 1904.

"EXHIBIT A."

UNITED STATES OF AMERICA:

Be It Remembered, That at the April Term A. D. 1897 of the District Court of the First Judicial District of the State of Kansas, sitting within and for the county of Leavenworth, in said state, begun and held in the City of Leavenworth, commencing on Monday, the 19th day of April A. D. 1897. Present the honorable Louis A. Myers, Judge, J. H. Rothenberger, Sheriff of Leavenworth County, Kansas, and James Gray, Clerk; the following proceedings were had to-wit:

SATURDAY, *May 15th, A. D.* 1897.

Court met pursuant to adjournment.

Present as before.

No. 10568.

LEONARD ZIMMERMAN, Plaintiff,

against

THE KANSAS CITY, WYANDOTTE AND N. W. RAILROAD COMPANY, Defendant.

Now on this 15th day of May A. D. 1897, and during the regular April Term of the District Court of Leavenworth county, Kansas, came on for hearing the defendant's motion for a new trial in the above entitled action; the plaintiff being present by his attorneys, Baker, Hook & Atwood, and the defendant by its attorneys, W. P. Waggener and C. F. W. Dassler, and the matters and things having been submitted to the court, and after arguments of counsel, the said motion for a new trial is overruled, defendant excepting, and thereupon it is ordered, adjudged and decreed that the said plaintiff do have and recover judgment of and from said defendant for the sum of Three thousand ($3000.00) Dollars and for $— costs of suit, and that execution issue therefor.

On application of the defendant the time within which to make and serve a case-made for the Supreme court is hereby extended ninety (90) days from this date, and the plaintiff is allowed 20 days thereafter in which to suggest amendments, and the same to be settled on five days' notice by either party.

"Exhibit B."

United States of America:

Be It Remembered, That at the April Term A. D. 1898, of the District Court of the First Judicial District of the State of Kansas, sitting within and for the county of Leavenworth, in said State, begun and held in the city of Leavenworth, commencing on Monday the 18th day of April A. D. 1898. Present the honorable Louis A. Myers, Judge, Peter Everhardy, Sheriff of Leavenworth County, Kansas, and James Gray, Clerk; the following proceedings were had, to-wit:

SATURDAY, *May 7th, A. D.* 1898.

Court met pursuant to adjournment
Present as before.

No. 10568.

LEONARD ZIMMERMAN, Plaintiff,
against
THE KANSAS CITY, WYANDOTTE AND N. W. RAILROAD COMPANY, Defendant.

And now on this 7th day of May A. D. 1898, comes Fred Zimmerman, Administrator of the estate of L. Zimmerman, deceased, by Baker, Hook & Atwood, his attorneys, and thereupon came on for hearing the motion of the said administrator heretofore filed herein to revive, in the name of Fred Zimmerman, as administrator of the estate of L. Zimmerman, deceased, this action and the judgment heretofore rendered in this action, on May 15th, 1897, in favor of the plaintiff, L. Zimmerman, and against the defendant, The Kansas City Wyandotte and N. W. R. R. Co.; and it appearing to the court that the defendant herein has been duly and legally served with a notice of said motion, and that they failed to appear either in person or by an attorney, or to show any cause why said motion should not be sustained.

It is therefore now by the court considered, ordered and adjudged that Fred Zimmerman, as Administrator of the estate of L. Zimmerman, deceased, be and he is hereby substituted as plaintiff herein with all the rights of the said plaintiff, and that this action and the orders and judgment rendered herein stand revived and hereafter proceed in the name of the said Fred Zimmerman, as Administrator of the estate of L. Zimmerman, deceased, and that he as such administrator have and recover of and from said defendant herein the sum of $3000.00 with interest thereon at the rate

of 6% per annum from the 15th day of May 1897 until paid and also the costs in this suit, and that execution issue therefor.

STATE OF KANSAS, *Leavenworth County, ss*:

I, James Gray, Clerk of the District Court of the First Judicial District of the State of Kansas, sitting within and for the County aforesaid, do hereby certify the above and foregoing to be — true, full and complete copy of The Journal Entry of the order of Court reviving this action and judgment in name of Fred Zimmerman, as administrator of the estate of L. Zimmerman, in the therein entitled cause, as the same remains of record in my office.

Witness my hand, and the seal of said court affixed at my office in the City of Leavenworth, this the 24th day of May A. D. 1899.

[SEAL.]

JAMES GRAY, *Clerk*,
By J. H. KIRMEYER,
Deputy Clerk.

"EXHIBIT C."

Ordinance No. 1296.

An Ordinance Granting Certain Rights of Way and Privileges to the Leavenworth and Olathe Railroad Company.

Be it ordained by the Mayor and Councilmen of the City of Leavenworth, Kansas:

SECTION 1. That the right to construct and operate a single line of railway track be and is hereby granted to the Leavenworth & Olathe Railroad Company, for a period of 20 years from and after the passage of this ordinance, over and upon the following streets and public grounds of the City of Leavenworth, to-wit: Across Limit Street on the southern boundary of the city; also across Second street at some point south of the

north line of Maple street; also over the south Levee, Front street, and South Esplanade, from the south line of Fackler's addition to the north line of Pine street; also across Spruce and Olive streets, east of Main street, and also across all other public grounds east of Main street, from the north line of Olive street, northward to a point north of Choctaw street, to connect with the tracks of the Leavenworth Depot and Railroad Company.

SECTION 2. That the grant herein made is upon the following conditions: The right is reserved and given to the Mayor and council of this city to allow other railroad companies to use the right of way of the Leavenworth and Olathe Railroad company from said Limit street to said point of connection with the track of said Leavenworth Depot & Railroad company and any track laid on said right of way, such company or companies to pay the Leavenworth & Olathe Railroad company a proportionate amount of the costs of the construction and maintenance of the same, and of the cost of such right of way. All differences between said companies as to the amount to be paid, and the manner of use to be determined by representatives, one to be selected by each company, and in case such two representatives cannot agree thereon, or said Leavenworth & Olathe Railroad Company neglects to name its representative, then the mayor and council of this city shall designate another arbitrator, who shall act with the others in determining the points of difference. Said Leavenworth & Olathe Railroad Company in crossing said streets shall so grade the approach on each side of its track as to permit easy and safe crossing of the same, and when practicable shall pass under the grade of the street and shall bridge such cut for the passage of pedestrians and vehicles on the street. In all such cases where the grade of any street or public ground is changed by said company, it shall protect the city from

cost and damage at the suits of property owners. All questions as to the manner of construction of said railroad over the right of way herein granted and concerning the protection of the streets and public grounds, and the safety and convenience of the passage of people and vehicles over the same, shall be determined by the engineer of said company and the city engineer, and the differences between them shall be determined by the mayor and council of this city. Unless said company shall construct and operate its track over the right of way herein granted within one year from the passage of this ordinance, all rights under this ordinance shall be forfeited without further action on the part of the city. Provided That if said company shall be delayed in the construction of its said road in the city of Leavenworth by an injunction or other litigation, the time that said company shall be so delayed shall not be computed as a part of the year within which it is required to construct and operate over the right of way herein granted, but said company shall have, within which to construct its said track, one year exclusive of the time it may be so delayed by injunction or other litigation. Said company shall, by writing, accept the terms and conditions of this ordinance within twenty days from the passage thereof.

SECTION 3. That this ordinance shall take effect and be in force from and after its approval and publication.

Approved November 17th A. D. 1886.

S. F. NEELY, *Mayor.*

Attest:

WM. SHEPHERD,
City Clerk.

Passed November 17th A. D. 1886.
Published November 18th A. D. 1886.

To which amended complaint the defendant, The Kan-

sas City Northwestern Railroad Company, filed its amended demurrer (Trans. of Rec., pp. 44-46), and the same was considered in connection with a motion of complainant to remand the case to the State Court. The motion to remand was overruled and denied, and the amended demurrer to the amended complaint was sustained (Trans. of Rec., pp. 47-48); and, judgment being entered for the defendant railroad company, the complainant prosecuted his appeal to the Circuit Court of Appeals—which court, on March 3d, 1906, reversed the judgment of the Circuit Court sustaining said demurrer, without the question of jurisdiction being raised.

The Circuit Court of Appeals, in 144 Fed. Rep., p. 624, said:

"Notwithstanding all the parties are citizens of Kansas, it is practically, and, we think, necessarily, conceded that the court below quired jurisdiction, on the ground that the suit, as origi. ly brought, involved the construction of the decree of the Federal Court in the foreclosure suit. We, accordingly, refrain from further considering the jurisdictional question, raised by the assignment of error."

And decided the controversy upon the merits; and, when the mandate of the Circuit Court of Appeals was entered, the defendant was given thirty days to elect as to whether or not it would stand upon its demurrer, and have final judgment rendered against it thereon, or whether it would elect to answer, and, in the event it elected to answer, time

was given in which so to do. (Trans. of Rec., pp. 50-51.)

The defendant elected to stand on its demurrer, and, thereupon, the court entered a decree *pro confesso*, giving judgment in favor of the plaintiff in error, against the defendant in error, and made a decree accordingly. (Trans. of Rec., pp. 53-56.)

The defendant filed its assignments of error, and prosecutes its appeal to this court for the purpose of securing a reversal of the judgment of the court below.

ASSIGNMENTS OF ERROR.

I.

That the Circuit Court of the United States, for the District of Kansas, First Division, erred in overruling the demurrer, interposed by the defendant, to the bill of complaint filed in this cause, and by holding and deciding, under the matters and things stated in said bill, it had jurisdiction

of said cause and jurisdiction to grant the relief praved for in said bill.

II.

That the Circuit Court of the United States, for the District of Kansas, First Division, erred in rendering final decree against defendant, on the bill filed herein, and rendering judgment against defendant for costs.

III.

Wherefore, in order that the foregoing assignments of error may be and appear of record, the defendant presents the case to the court, and prays that some disposition may be made thereof, in accordance with the law and statutes of the United States in such cases, and complainant prays a reversal of the decretal order and decree of final judgment, made and entered by said court.

ARGUMENT AND BRIEF.

THE CAUSE WAS IMPROPERLY REMOVED FROM THE STATE COURT TO THE CIRCUIT COURT.

The record does not present a case of diverse citizenship. The petition for removal was prepared upon the theory that the provisions of Section 709 of the Revised Statutes applied to and controlled the right of removal to the same extent as it authorized a review by this court of the decisions of the highest courts of the states, in suits "where any title, right, privilege or immunity is claimed, under the constitution, or any treaty or statute of, or commission held, or authority exercised, under the United States, and the decision is against the title, right, privilege or immunity specially set up, or claimed by either, under such constitution, treaty, statute, commission or authority."

This erroneous theory is clearly pointed out by this court in the case of *Carson* v. *Dunham*, 121 U. S., 427-428. The fact that the defendant, in the State Court, secured a removal of the cause to the Circuit Court, upon a mistaken view of the law, could not give the Circuit Court jurisdiction, and the judgment rendered should be vacated and set aside, if it affirmatively appears that the cause was improperly removed.

Ry. Co. v. *Swan*, 111 U. S., 382-385;

Wabash R. R. Co. v. *Barbour*, 73 Fed. (C. C. A.), 513-514.

In the case of *Chappel* v. *Waterworth*, 155 U. S., 102, it was said that a case not depending on the citizenship of the parties, or otherwise provided for, "cannot be removed from a state court into the Circuit Court of the United States, as one arising under the constitution, laws or treaties of the United States, unless that appears by the plaintiff's statement of his own claim; *and if it does not so appear, the want cannot be supplied by any statement in the petition for removal, or in the subsequent pleadings.*"

See also:

Postal Tel. Co. v. *Alabama*, 155 U. S., 487;
Arkansas v. *Kan., etc., R. R. Co.*, 183 U. S., 185;
Boston, etc. v. *Montana, etc.*, 188 U. S., 639.

In the case of *Defiance Water Co.* v. *Defiance*, 191 U. S., 185, is was said that:

"When a suit does not really and substantially involve a dispute or controversy as to the effect or construction of the constitution or laws of the United States, upon the determination of which result depends, it is not a suit arising under the constitution or laws; *and it must appear on the record, by a statement in legal and logical form, such as is required by good pleading, that the suit is one which does really and substantially involve a dispute or controversy as*

to a right, which depends on the construction of the constitution, or some law or treaty of the United States, before jurisdiction can be maintained on that ground."

Newburyport Water Co. v. *Newburyport*, 193 U. S., 576.

Did the petition (Trans., pp. 2-6), filed in the State Court, present a cause of action which involved a dispute or controversy "as to the effect or construction of the constitution or laws of the United States"? If it did not, the Circuit Court acquired no jurisdiction, and, within the rule announced by this court in the case of *Defiance Water Co.* v. *Defiance*, 191 U. S., 194, the judgment of the court below should be reversed. In that case it was said that:

"The fundamental question of jurisdiction, first, of this court ,and then of the court from which the record comes, presents itself on every writ of error or appeal, and must be answered by the court, whether propounded by counsel or not.

Mansfield, C. & L. M. R. Co. v. *Swan*, 111 U. S., 379, 382; 28 L. Ed., 462, 464; 4 Sup. Ct. Rep., 510;

Metcalf v. *Watertown*, 128 U. S., 586; 32 L. Ed., 543; 9 Sup. Ct. Rep., 173;

Morris v. *Gilmer*, 129 U. S., 315; 32 L. Ed., 690; 9 Sup. Ct. Rep., 289;

Continental Nat. Bank v. *Buford*, 191 U. S., 119; *ante*, 119; 24 Sup. Ct. Rep., 54.

The Circuit Court, having maintained jurisdiction on the ground that the case arose under the constitution of

the United States, and, having proceeded to decree, the appeal was properly brought directly to this court, and it at once became our duty to inquire whether the Circuit Court should have retained the case. Having reached the result that the court erred in so doing, we are vested with the power to direct that conclusion to be carried into effect, and in its exercise we discharge one of our essential functions—the determination of the jurisdiction of the courts below.

Morris v. *Gilmer*, 129 U. S., 315; 32 L. Ed., 690;
Wetmore v. *Rymer*, 169 U. S., 115; 42 L. Ed., 682; 18 Sup. Ct. Rep., 293;
Aztec Min. Co. v. *Ripley*, 151 U. S., 79; 38 L. Ed., 80; 14 Sup. Ct. Rep., 236."

See *Newburyport Water Co.* v. *Newburyport*, 193 U. S., 576.

The only foundation for the claim that the suit involved a construction of the constitution and laws of the United States is the averment in the petition (Trans., p. 4), that, on or about March, 1891, the Farmers' Loan & Trust Company brought an action in the Circuit Court of the United States, for the District of Kansas, to foreclose a mortgage executed by the Kansas City, Wyandotte & Northwestern Railroad Company, and a decree of foreclosure was entered, and that thereafter, the said "railroad company, and all of its equipment, etc.," "were sold to the defendant, The Kansas City, Wyandotte & Northwestern Railroad Company, and that said defendant became the successor in interest to all the rights, franchises and privileges of said Kansas City, Wyandotte & Northwestern Railroad

Company, and, *as part consideration*, assumed and was subject to all of the liabilities of the * * * Kansas City, Wyandotte & Northwestern Railroad, under and by virtue of said decree and purchase."

Again (Trans., p. 5), that, "under and by virtue of the decree of foreclosure and the purchase aforesaid, and of accepting and operating said railroad under and by virtue of the ordinance of said city, and its agreement to save the City of Leavenworth harmless from all damages sustained by property owners, by reason of the construction of the railroad aforesaid, said defendant, The Kansas City & Northwestern Railroad Company, has become liable to said plaintiff for the amount of said judgment, with interest and costs."

Again (Trans., p. 5), that, "under and by virtue of said decree and the ordinances of said city, said defendant, Kansas City & Northwestern Railroad Company, *assumed* and *agreed* to pay off any and all obligations of the Kansas City, Wyandotte & Northwestern Railroad Company, etc."

There is no claim made in the petition that defendant, The Kansas City Northwestern Railroad Company, was a party to the decree, but its liability for the judgment against the Kansas City, Wyandotte & Northwestern Railroad Company, is based upon the sole ground that it

became the purchaser, under the decree of foreclosure, and, *thereby* the successor in interest of the Kansas City, Wyandotte & Northwestern Railroad Company, and assumed and *agreed* to pay any and all obligatiins of the Kansas City, Wyandotte & Northwestern Railroad Company," etc.

It is not alleged or claimed in the petition that the decree fixed any such liability, but the cause of action attempted to be stated is that, because of the fact that the Kansas City & Northwestern Railroad Company purchased all the property, rights, franchises and privileges of the Wyandotte Company, under the decree of foreclosure of a mortgage, of date January, 1888, it became liable for all of the unsecured obligations of the Wyandotte Company, which accrued subsequent to the date of the mortgage, and that it "*assumed* and *agreed*" to pay the same.

If such statement of facts discloses a controversy which involved a construction of the constitution and laws of the United States, the suit was properly removed to the Circuit Court; otherwise not.

In the case of *Provident Saving Society* v. *Ford*, 114 U. S., 635, it was said that:

"The fact that a judgment was recovered in a court of the United States, does not, in a suit upon the judgment, raise a question, under the laws of the United States, within the meaning of the act of March 3d, 1875."

If a suit on a judgment of a United States Circuit Court does not involve a construction of the constitution and laws of the United States, can it be successfully contended that a mere reference to such a judgment, without basing any right thereon, involves such a construction as would have given the Circuit Court jurisdiction, had the suit been originally brought in that court?

In the case of *Mexican R. R.* v. *Davidson*, 157 U. S., 208, it was said that:

"The jurisdiction of the Circuit Courts on removal by the defendant, under this section, is limited to such suits as might have been brought in that court by the plaintiff under the first section. *The question is a question of jurisdiction, and cannot be waived.*"

Tennessee v. *Union Bank*, 152 U. S., 454, 460;

Ex-parte, Wisner, 203 U. S., 449.

Recurring to the petition—

In the case of *Leather Mfg. Bk.* v. *Cooper*, 120 U. S., 778, it was held that:

"A case does not arise under the laws of the United States simply because this court has decided in another suit the questions of law which are involved."

Swearinger v. *St. Louis*, 185 U. S., 44.

The decision of this court, cited *supra* (*Provident Sav.*

Society v. *Ford*, 114 U. S., 635), was quoted approvingly in the cases of

Carson v. *Dunham*, 121 U. S., 427-428;

Rand v. *Walker*, 117 U. S., 340.

The question whether or not a Federal question was involved must, under many decisions of this court, be determined from the plaintiff's own statement of his case, and, "if it does not so appear, the want of it cannot be supplied by any statement of the petition for removal, or the subsequent pleadings, or by taking judicial notice of facts not relied on regularly brought into the controversy"—as was decided by this court, in the case of *Arkansas* v. *K. & T. Coal Co.*, 183 U. S., 185.

It is not alleged in the petition filed in the State Court that the judgment and decree of the Circuit Court involved any construction of the constitution and laws of the United States. On the contrary, it affirmatively appears that the suit in the Circuit Court was an ordinary foreclosure proceeding, and the judgment an ordinary decree, under which a sale of the mortgaged property was had, and the defendant became the purchaser. It does not appear from said petition that there was or could be any controversy between the plaintiff and defendant as to the validity of the decree. On the contrary, sufficient appears from the petition to justify the conclusion that the controversy was one of

fact and law, which did not and could not involve or make necessary a construction of the constitution or any law of the United States.

In the case of *Metcalf* v. *Watertown*, 128 U. S., 586, it was held that:

"The fact that a suit is brought to recover the amount of a judgment of a court of the United States, does not, of itself, make it a suit arising under the constitution and laws of the United States."

In the case of *Joy* v. *St. Louis*, 201 U. S., 340, it was said that:

"It is a long settled rule, evidenced by many decisions of this court, that the plaintiff cannot make out a case as arising under the constitution or the laws of the United States, unless it necessarily appears by the complaint or petition or bill, in stating plaintiff's cause of action."

In the case of *Leather Mfg. Bank* v. *Cooper*, 120 U. S., 781, it was said that:

"A suggestion was made in the argument that the case is one arising under the laws of the United States, for the reason that the cause of action is identical with that sued on in *Leather Manufacturers Bank* v. *Morgan*, 117 U. S., 96, decided by this court at the last term, and in which the principles of law which govern the right of the parties were determined. Nothing of the kind, however, appears in the record, *and, if it did, it would not authorize a removal. This is not that suit, and a case does not arise under the laws of*

the United States simply because this court, or any other Federal court, has decided in another suit the questions of law which are involved."

THE CIRCUIT COURT DID NOT HAVE ANY JURISDICTION TO GRANT THE RELIEF PRAYED FOR UNDER THE AMENDED BILL OF COMPLAINT, FILED IN THAT COURT AFTER THE REMOVAL FROM THE STATE COURT.

After the case was removed to the Circuit Court, the plaintiff filed an amended complaint (Trans., pp. 31-37), in which certain portions of the decree were set forth—in which, among other things, it was provided that the sale was confirmed "subject to the provisions of said original decree, and subject to the provisions to be contained in the deed, executed by said Master Commissioner, to said purchaser" (Trans., p. 34); and a copy of the endorsement on the deed, as follows, viz.:

"The foregoing deed examined and approved, subject

to all orders of the court, relating to the payment of the debts of the Company, and the Receiver, and said property shall remain liable for such debts, if any there are, remaining unpaid.

HENRY C. CALDWELL,
U. S. Circuit Judge."

(Trans., pp. 34-35.)

To this amended complaint, defendant filed a demurrer (Trans., pp. 44-46), which was sustained by the Circuit Court (Trans., pp. 47-48), and its opinion copies from the original decree as follows, viz.:

"This court hereby reserves to itself from this decree the power and jurisdiction, both as against the parties to this suit and as against said purchaser, at said contemplated sale, to hear and adjudicate all pending and undetermined claims hereafter presented, whether contracted by the Receiver or the mortgagor company before the commencement of this suit, and to determine as to said claims whether they are or are not valid, and entitled to priority over the mortgage debts hereinbefore referred to, and to make all such orders and supplementary decrees, touching said claims and demands, as may be deemed proper, etc."

This decision of the Circuit Court was reversed by the Circuit Court of Appeals, on appeal taken thereto by the complainant. (See 144 Fed. Rep., pp. 623-627.)

It will be observed that the Circuit Court of Appeals decided the case upon the constitution of the State of Kansas, which provides (Art. 12, Sec. 4) that:

"No right of way shall be appropriated to the use of

any corporation until full compensation therefor be first made in money, or secured by a deposit of money."

(It may be observed that, by repeated decisions of the Supreme Court of Kansas, this section of the constitution has been construed to apply only to a right of way over property owned by an individual, and not to damages to an abutting owner, on account of obstructions to the ingress to and egress from his property, by reason of the construction of railway tracks over a street, which right is given by express statute. Sub. fourth, Sec. 1316, Genl. Stat. of Kan., 1901, p. 297.)

The decision of the Circuit Court of Appeals shows conclusively that the controversy did not involve a construction of the constitution of the United States, or any law of the United States. When the case was remanded to the Circuit Court, the defendant elected to stand on its demurrer, and a decree *pro confesso* was taken, in which the court finds that the suit instituted in the State Court was "duly removed" to the Circuit Court, and made the finding that:

"13½. The court further finds that one of the conditions in the said foreclosure decree was as follows:

'This court hereby reserves to itself from this decree the power and jurisdiction, both as against the parties to this suit, and as against said purchaser, at said contemplated sale, to hear and adjudicate all pending and undetermined claims hereafter presented, whether contracted by the Re-

ceiver or the mortgagor company, before the commencement of this suit, and to determine as to said claims whether they are or are not valid, and entitled to priority over the mortgage debts hereinbefore referred to, and to make all such orders and supplementary decrees touching said claims and demands as may be deemed proper.'

And that a condition off the order of confirmation of said foreclosure sale was as follows:

'And said Master Commissioner is ordered and directed to make to the purchasers at said sale, to-wit: George C. Smith and B. P. Waggener, purchasing trustees, a good and sufficient deed, conveying the property mentioned and described in said report to said purchasers—said report being confirmed, however, subject to the provisions of said original decree and subject to the provisions to be contained in the deed executed by said Master Commissioner to said purchaser.'

And that the following order was endorsed on the purchasers' deed:

'The foregoing deed examined and approved, subject to the condition that the purchaser take the property subject to all the orders of the court, relating to the payment of the debts of the company, and the Receiver, and said property shall remain liable for such debts, if any there are remaining unpaid.'

HENRY C. CALDWELL,
U. S. Circuit Judge."

The defendant filed its assignments of error (Trans., p. 57) and an appeal was allowed (Trans., p. 58), and the question of jurisdiction duly certified to this court.

We submit that the foreclosure decree, as made by the Circuit Court (Trans., p. 55), clearly shows that the Dis-

trict Court of Leavenworth County had no jurisdiction to either enforce the judgment in the suit against the assignee of the purchaser, under such decree, or to determine the validity or extent of the judgment against the Wyandotte Company, or to establishe such judgment as a lien on the property purchased under the decree, superior to the mortgage liens therein foreclosed, and that, by the removal, if properly removed, from the State Court, the Circuit Court only acquired such jurisdiction and power to determine, as the State Court possessed and might have exercised had there been no removal.

It will be conceded, we think, that the Circuit Court acquired *exclusive* jurisdiction of the foreclosure proceedings in the case of the Farmers' Loan & Trust Company against the Kansas City, Wyandotte & Northwestern Railroad Company, long prior to the institution by Zimmerman of his action in the State Court, and, in the decree (Trans., p. 47), reserved the power and jurisdiction, both as against the parties to the suit, and as against the purchaser, to *hear* and *adjudicate* all pending and undetermined claims against the mortgagor company, before the commencement of the suit.

It seems to be well settled by decisions of this court that the jurisdiction having first attached in the Circuit Court, it retains it *exclusively*, and will be left to determine

the controversy, and to fully perform and exhaust its jurisdiction, and to decide every issue or question properly arising in the case, and that such jurisdiction cannot be divested or arrested by subsequent proceedings in another court.

Harkrader v. *Wadley*, 172 U. S., 148;

In-Re Chatwood, 165 U. S., 443.

In the foreclosure suit, the court took possession of the property of the mortgagor, and, for the purposes mentioned in the decree, reserved and retained jurisdiction over the parties as well as the property.

In the case of *Farmers' Loan & Trust Co.* v. *Railroad Co.*, 154 U. S., 51, this court held that such jurisdiction was exclusive, and disabled "other courts of co-ordinate jurisdiction from exercising a like power."

Clearly, therefore, the State Court, from which the cause was removed, had no power or jurisdiction to grant the relief prayed for in the original petition, or on the facts as disclosed by the amended complaint.

In the case of *E. Tenn. Va. & Ga. R. R.* v. *South Tel. Co.*, 112 U. S., 310, the principle was announced that the courts of the United States, on removal of a suit from a state court, are "clothed with no greater power in the premises than the courts of the state would have possessed if their jurisdiction had been preserved."

Randall v. *Howard*, 2 Black (U. S.), 589.

Can it be successfully contended that the state court, on the facts found by the court below (Trans., pp. 53-54), would have had jurisdiction to fasten a lien upon the property covered by the foreclosure proceedings, which property, by the very terms of the decree, was in the custody of the Federal Court? Could Zimmerman, as an unsecured creditor, derive any benefit from or base any proceeding in the state court upon the decee of the Circuit Court when, by the terms of the decree, exclusive jurisdiction was retained in that court? But for the decree, on the conceded facts, he would have had no status in any court. That decree gave him a status *only* in the court which made the decree, reserving exclusive jurisdiction. Could he, therefore, ignore the conditions of the decree, and, by the institution of an independent suit in the state court, give that court jurisdiction and power to divest the Circuit Court of its exclusive jurisdiction under the decree? The reservation in the decree is valid as an entirety, or void *in toto*.

We understand the rule to be as announced in the case of *Swift* v. *Railroad Co.*, 58 Fed., 861, that:

"The courts of the United States, upon removed cases, have no wider jurisdiction than the courts of the states from which they were removed. The removal simply transfers the hearing from the state court to the national tribunal, but does not enlarge the right of the court to hear the cause."

Under the reservations in the decree, the question as to the complainant's right under that decree was a matter of primary as well as exclusive jurisdiction in the Circuit Court which made the decree, and could not be invoked in the state court.

Barrow v. *Hunton*, 99 U. S., 80-85.

If we correctly understand the decision of this court in the case of *Minnesota Co.* v. *St. Paul, etc.*, 2 Wal., 609, it is decisive of this case. The court said (p. 633):

"An unjust advantage has been obtained by one party over another by a perversion and abuse of the orders of the court, and the party injured comes now to the same court to have this abuse corrected, and to carry into effect the real intention and decree of the court, and that while the property which is the subject of contest is still within the control of the court, and subject to its order."

And the court further said (p. 632):

"The present suit is really a continuation of that one. The rights of the parties depend upon the construction which is placed upon the acts of the court in it; and the present bill is necessary in order to have a declaration of what was intended by the orders and decrees made in that suit, and to enforce the rights which were established by it."

The only difference between the case cited *supra* and the case at bar is that in the Minnesota case the complainant was a party to the original foreclosure, while the com-

plainant Zimmerman was not a party to the foreclosure proceedings in the case of the *Farmers' Loan & Trust Co.* v. *Wyandotte Company*, in which the decree was made, and hence his rights under the decree, if any he had, could only have been enforced by intervention in that case. The Circuit Court would have had no original jurisdiction because the requisite diverse citizenship did not exist, and the averments of neither his petition in the state court nor in his amended complaint show that a construction of the Constitution of any law of the United States was involved.

It appears by the petition filed in the state court that, in the foreclosure suit in the Circuit Court, that court had no jurisdiction of the parties to the action in the state court, and no jurisdiction of the subject matter, and, by the amended complaint, that the Circuit Court, by the reservation of the decree, retained jurisdiction of the parties and the subject matter. The decree of foreclosure was entered on the 18th day of January, 1893, (Trans., p. 54), and this action was commenced in the state court on the 21st day of May, 1899. (Trans., p. 55.)

Randall v. *Howard*, 2 Black (U. S.), 589.

The amended complaint on which the decree was entered did not state a case under the Constitution or laws of the United States. It seems to us that this contention is settled by the decision of this court in the case of *Rand*

v. *Walker*, 117 U. S., 340-345. At page 345 the court said:

"After the suit got into the Circuit Court, a supplemental bill was filed by Mrs. Walker, in which she alleged that a certain judgment which had been obtained in the Circuit Court of the United States after removal, in a suit to which she was not a party, had been obtained by collusion between the parties thereto, and did not conclude her upon certain questions arising under the deed of trust to Brown. This, it is claimed, gave the Circuit Court jurisdiction independent of any removal, on the ground that thereafter the suit was one arising under the Constitution and laws of the United States, within the meaning of the act of 1875. To this we cannot agree. The effort of Mrs. Walker is not to avoid the judgment as between the parties, but to show that, as to her, she not being a party, it has no effect. This raises no question under the authority of the United States."

From the foregoing decisions of this court, it would seem to be settled that if the state court had no jurisdiction to grant the relief prayed for, the Circuit Court, by the removal, acquired no such jurisdiction, and that the decree of the Circuit Court should for that reason be reversed.

In the case of *Newburyport Water Co.* v. *Newburyport*, 193 U. S., 575, it was said that:

"At the threshold we are met with the objection, raised below and urged at bar, that the Circuit Court was without jurisdiction, because the bill on its face did not state a case arising under the Constitution or laws of the United States.

within the intendment of the act of August 13th, 1888, 25 Stat. at L., 433, chap. 866, (U. S. Comp. St. 1901, p. 508). As the case is here on direct appeal from the decree of the Circuit Court of the United States, the solution of this question necessarily involves also deciding whether the cause was properly brought to this court. As the existence of the constitutional question is the only basis of the right to the direct appeal, if there was no such question in the court below there was and is no such issue by which the direct appeal to this court can be sustained. Under these circumstances, if the contention as to want of jurisdiction of the court below, arising from the alleged absence of constitutional questions, be well founded, our duty is not simply to dismiss the appeal, but to reverse the decree below, with instructions to the Circuit Court to dismiss the bill for want of jurisdiction. *Defiance Water Co. v. Defiance*, 191 U. S., 184."

THE DECISION OF THE CIRCUIT COURT OF APPEALS WAS NOT FINAL, AND THIS COURT HAS JURISDICTION TO HEAR THIS APPEAL.

After the pleadings were recast in the Circuit Court, the complainant filed the following motion to remand the

case to the District Court of Leavenworth county, viz. (Trans., p. 46.):

"Now comes the above named plaintiff, and moves the court to remand this case to the District Court of Leavenworth county, Kansas, for the reason that this court has no jurisdiction to hear or try the same.

JOHN H. ATWOOD, and
WILLIAM W. HOOPER,
Attorneys for Complainant."

This motion was overruled by the Circuit Court. (Trans., p. 48.) After the demurrer was sustained by the Circuit Court, the complainant appealed to the Circuit Court of Appeals, and, among other things, assigned as error (Trans., p. 62.):

"That the court erred in not sustaining complainant's motion to remand said cause to the District Court of Leavenworth county, Kansas, from whence it had come on removal at the instance of the defendant herein."

The Circuit Court of Appeals said:

"Notwithstanding all the parties are citizens of Kansas, it is practically and we think necessarily conceded that the court below acquired jurisdiction, on the ground that the suit, as originally brought, involved the construction of the decree of the Federal Court in the foreclosure suit. We accordingly refrain from further considering the jurisdictional question raised by the assignment of error."

In the final decree (Trans., p. 55) the Circuit Court found that "said case was duly removed to this court, etc."

It will thus be seen that each side was uncertain as to the jurisdiction of the court.

It is now claimed that the case has been improperly appealed to this court, but that question is put at rest by section 5, (26 Stat., 826), March 3rd, 1891, which provides that:

"Appeals or writs of error may be taken from * * * the existing Circuit Courts direct to the Supreme Court in the following cases:

In any case in which the jurisdiction of the court is in issue."

In the case of *Northern Pacific Ry.* v. *Soderberg*, 188 U. S., 528, it was said that:

"To impress the attribute of finality upon a judgment of the Circuit Court of Appeals, it must appear that the original jurisdiction of the Circuit Court was dependent entirely' upon diverse citizenship."

We respectfully submit that the judgment of the court below should be reversed, for the reason that the case was improperly removed from the state court, and for the reason that the state court had no jurisdiction of the subject matter of the action, and that, on the removal, if properly made, the Circuit Court acquired only the jurisdiction of the state court, and, therefore, had no jurisdiction to grant the relief prayed for.

BALIE PEYTON WAGGENER,

Attorney for Appellant.